

# BALI MAWACARA: IS A QUASI-COMMON LAW SYSTEM DEVELOPING IN BALINESE CUSTOMARY LAW?

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## Abstract

*Internationally renowned as a tourist destination, the Indonesian Island of Bali displays a rich and colorful culture which has served as one of the many explanation for its global reach. Its primarily Hindu population is visibly seen through a rather invisible disposition that perpetuates itself through the Balinese customary legal system which influences daily life. This autochthonous legal system exists in plurality with the Indonesian state legal system. As with all legal systems, the Balinese customary law system is in a state of flux. This article will examine the foundational sources and purposes of authority in the Balinese customary law system and analyze the pressures of change upon that system. It will be argued that an embryonic quasi-common law system is developing within the opus of Balinese customary law system due to the recent formation of the Majelis Utama Desa Pakraman (Pakraman Primary Village Council) and the Bali Mawacara jurisprudence.*

**Keywords:** Bali, customary law, Bali mawacara, Majelis Utama Desa Pakraman

## I. INTRODUCTION

This article examines traditional customary law-making practices in Bali, analyzing the impact of contemporary pressures faced that would change the system. Such changes deeply effected the *Majelis Utama Desa Pakraman* (Pakraman Primary Village Council) and the jurisprudence of *Bali Mawacara*. The article seeks several factors, namely law-making practices in Bali that were implemented before the emergence of the Council, forging out to the justification of how the Council was established. Furthermore, the article develops a greater depth as to how the Council and the *Bali Mawacara Jurisprudence* influence customary law-making practices in Bali today. Bridging from this narrative, the article offers practical and philosophical suggestions to continue research within this area.

## II. INITIAL CUSTOMARY LAW-MAKING PRACTICES IN BALI BEFORE THE EMERGENCE OF THE PAKRAMAN PRIMARY VILLAGE COUNCIL

Bali's context of customary law is greatly interlaces within the province's rooted principles in the Hindu religion. This form of Balinese Hinduism formulates the worldview of the population, bringing forward the need for law, especially the necessity of Balinese customary law that can regulate the behavior of the community.

Indic culture and the Hindu religion have greatly navigated life within the island for well over a millennia. The Balinese political elite sought closer associations with India in order to strengthen their domestic and foreign affairs, underlining the

island's political as well as economic positions. The acceptance of Hinduism allowed local rulers to receive Brahmanic consecrations.<sup>1</sup> In India the term 'Hindu' refers to the Siwaist and Wisnuist religions whereas in Bali, the reference of Hinduism is also associated with a myriad of other spiritual practices which includes Buddhism.<sup>2</sup> Balinese culture integrated Hinduism with existing religious traditions, evolving into the Hindu Dharma Bali religion which combines Hinduism, Buddhism and local animistic beliefs. There are three elements that are incorporated within the practice and understanding of the religion and this includes: philosophy (*tatwa*), ethics (*susila*) and ceremony (*upacara*).

There are five principle philosophical aspects of Hinduism that are implemented by the Balinese and there are the concepts of: *Brahman* (the existence of a supreme God), *Atman* (the eternal spirit or soul of each human), *Karmapala* (people are supernaturally rewarded or punished according to their deeds), *Punarbawa* (reincarnation), and *Moksa* (the goal of union with God).<sup>3</sup> Known as *panca serada*, these formulate the major elements of *tatwa* which is a tripartite approach to most aspects of life and death adhered to the Balinese. That tripartite approach focusses on the relationship between the Balinese Hindu with God, among themselves as well as the state of the physical environment owned by the Balinese Hindu people. This *parihyangan-pawongan-palemahan*<sup>4</sup> approach has in more recent times been articulated as *Tri Hita Karana*, translatable as the Three Sources of Happiness.<sup>5</sup>

A Balinese Hindu village that promulgates its own customary law is known in the local language as a *desa adat*. Each *desa adat* has at least one sub-unit known as a *banjar*; a typical *desa adat* will have a few *banjar*.<sup>6</sup> The *banjar* is a social group which has its own building (*bale banjar*) that behaves as a physical hub of social activity in the *desa adat*. The nature and requirements of the *desa adat* can vary from one village to another. Typically, the more modern *desa adat* is closer to the intra-national and inter-national activities in Bali such as government offices and tourism activities which prescribe less onerous requirements on their members compared to the more remote and traditional *desa adat*.<sup>7</sup> The typical *desa adat* will also have its own tripartite temple complex known as *Pura Khayangan Tiga*.<sup>8</sup> In addition, the significant social constructs affecting Balinese customary law include the paternal kinship system (*kapurusa*) and the caste system (*kasta*) that divides the whole Balinese population into four sections that historically determined vocation within traditional Balinese society.

Finally, the whole of Bali forms one of 34 provinces of the Republic of Indonesia. Legal pluralism is an uncontested concept in the Indonesian legal landscape. The validity of specific laws and questions of jurisdiction do arise from time to time. For example, the Supreme Court of Indonesia has determined that a defendant who has already been punished under customary law cannot be prosecuted again for the same offence in that court.<sup>9</sup> But the existence of legal pluralism is beyond contention.

<sup>1</sup> Roelof Goris. *Bali: Studies in Life, Thought and Ritual* (The Hague and Bandung, W Van Hoeve Ltd, 1960) p. 18.

<sup>2</sup> August Johan Bernett-Kempers. *Monumental Bali: Introduction to Balinese archaeology & guide to the monuments* (Singapore, Periplus Editions, 1991) p. 33.

<sup>3</sup> I Made Widnyana. *The Living Law as Found in Bali* (Indonesia, PT Fikahati Aneska, 2013) p. 86.

<sup>4</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Ch 2.

<sup>5</sup> Widnyana, loc. cit., 89.

<sup>6</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Ch 1, Art 1(5).

<sup>7</sup> Wayan Sana, personal communication, Denpasar, 5 May 2019.

<sup>8</sup> Widnyana, loc. cit., 98.

<sup>9</sup> Supreme Court of Indonesia Decree No. 1644 k/Pid/1988, 15 May 1994.

While these villages which are rooted towards customary practices (*desa adat*) is recognized in Indonesia,<sup>10</sup> the formulation of customary law (*awig-awig*) takes into account,<sup>11</sup> the Constitution, *Pancasila* (guiding principles) or human rights.<sup>12</sup> Bali's position in the Republic of Indonesia gives rise to a duality of village identities that exist in almost every Balinese village which are the customary villages (*desa adat*) and the official villages sanctioned by the government (*desa dinas*). The village is simultaneously part of the Indonesian state (as a *desa dinas*) and thereby is accountable under the government apparatus and the jurisdiction of the Republic of Indonesia. However, there are villages which establish its own norms and community governance communicated as a *desa adat*.<sup>13</sup> For example, the *krama* (members of the *desa adat*) may meet in the community building (*bale banjar*) for the customary law purpose of discussing and deciding upon amendments in one instance, and in the next the community building can be utilized one day and the next day the same people may again meet in the *bale banjar* to vote in a national election. While the people and place overlap, the leadership of the *desa dinas* and the *desa adat* do not. Those roles are kept separate and filled by different individuals in order to avoid potential confusion. All individuals who reside in the village will come under the jurisdiction of the *desa dinas* but only the *krama* will come under the jurisdiction of the *desa adat*. By far the majority of villages have only a small proportion of residents who are not *krama*.

The most commonly asserted primary source of authority for customary law in Bali is the traditional village – the *desa adat*, also known as *desa pakraman* or *desa dresta*.<sup>14</sup> The *desa adat* is a 'unified legal community' in Bali, governed by its own customary law, which maintains its own Hindu tradition, territory and wealth and asserts its own legal autonomy.<sup>15</sup> Additionally, the *desa adat* is recognized by the Indonesian Constitution.<sup>16</sup> The *desa adat* produces its own *awig-awig* that may be written or unwritten.<sup>17</sup> In addition to the *desa adat* there are many *subak* – the traditional irrigation societies in Bali.<sup>18</sup> Irrigation is essential to Balinese agriculture which is dominated by wet-rice horticulture. Each land-owner in a given area belongs to the *subak* of that area. The *subak* are also sources of customary law in Bali, producing their own *awig-awig*.<sup>19</sup> This paper will focus on the *desa adat* rather than the *subak* as the *awig-awig* of the *subak* are limited to matters in respect of irrigation whereas the *awig-awig* of the *desa adat* are concerned with many aspects of life.

Each *desa adat* has its own governing board made up of various functionaries (*prajuru*) such as a chairman (*bendesa*), secretary and treasurer.<sup>20</sup> All members

<sup>10</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Article 1(4); The Constitution of the Republic of Indonesia of 1945, Article 18.

<sup>11</sup> In the statutory context the reference to religion is probably only in reference to the Hindu religion of Bali.

<sup>12</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Ch VII, Article 11.

<sup>13</sup> Carrol Warren. *Adat and Dinas: Balinese communities in the Indonesian State* (Kuala Lumpur, Oxford University Press, 1993).

<sup>14</sup> Agung Wardana, *Contemporary Bali: Contested Space and Governance* (Singapore, Springer, 2019) p. 49.

<sup>15</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Article 1(4).

<sup>16</sup> Article 18.

<sup>17</sup> Widnyana, loc. cit., 55, 59.

<sup>18</sup> Dinas Pekerjaan Umum Proyek Peningkatan Fungsi Museum Subak. *Subak in Bali* (Bali, Dinas Pekerjaan Umum Proyek Peningkatan Fungsi Museum Subak, 1997).

<sup>19</sup> Widnyana, loc. cit., 55.

<sup>20</sup> Ibid.

of the *desa adat* form a body politic known as *krama desa*. Before the leadership approve a particular *awig-awig* a village meeting (*paruman*) of the *krama desa* will be called in which the proposed law will be discussed. The *parihyangan-pawongan-palemahan* philosophy is applied to the proposed law with the objective of seeking to maintain a natural and supernatural balance, order and peace for the *desa adat*. In so doing, relationships amongst the *krama*, relationships between *krama* and the environment and relationships between the *krama* and God are all considered. The *bendesa* also has the authority to serve as mediator when required.<sup>21</sup>

The *krama desa* make collective decisions via a process of discussion and consensus known as *musyawarah* before enacting the *awig-awig*.<sup>22</sup> As such the *awig-awig* can be described as having a type of democratic nature. Generally speaking, this democracy is direct since all *krama desa* members are able to contribute directly to the *musyawarah*.<sup>23</sup> The *awig-awig* can be changed by the *musyawarah* process without reference to precedent or other similar restriction, however the *awig-awig* cannot contradict Indonesian state law.<sup>24</sup>

Maintaining natural and supernatural order is a primary purpose of Balinese customary law according to the Balinese Hindu philosophy of *parihyangan-pawonga-palemahan*. Accordingly, Balinese customary law is continuously seeking cosmic balance<sup>25</sup>. Customary law in Bali seeks to restore order after there has been a violation. In Indonesian jurisprudential terms this is referred to as *rechtsherstel*. The most common type of penalty imposed in order to accomplish *rechtsherstel* is compensation. A criminal offence in Balinese customary law causes disorder according to the Balinese Hindu philosophy of *parihyangan-pawonga-palemahan*: disorder in the natural society and disorder in the supernatural realm. Therefore the compensation may be natural (transfer of things of natural value from the perpetrator to the victim and/or the village), supernatural (transfer of things of supernatural value from the perpetrator to the victim, the village and/or a supernatural entity) or a combination of both.<sup>26</sup>

Balinese customary law regulates most areas of human behavior common to life in Balinese villages. Given that maintaining social and cosmic order is a primary purpose of Balinese customary law, it is not surprising to find that a significant number of *awig-awig* exist on the topic of regulating sexual relations, especially those outside of marriage that can or do result in pregnancy.<sup>27</sup> Nor is it surprising to find that specific laws exist in relation to interference with sacred objects.<sup>28</sup> The customary law duties (*ayah-ayahan*) that are the responsibility of the *krama* are many and can be onerous.<sup>29</sup> Examples include attending community meetings and contributing towards social activities such as weddings. Accordingly, *awig-*

<sup>21</sup> Widnyana, loc. cit., 55 - 61.

<sup>22</sup> Widnyana, loc. cit., 97.

<sup>23</sup> Exceptions to this general observation exist, such as in *Desa Adat Selat* where a limited number of *krama* have the right to vote.

<sup>24</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Ch VII, Article 11.

<sup>25</sup> Daniel Fitzpatrick. "Disputes and pluralism in modern Indonesian land law" *Yale Journal of International Law*, 22(1) (1997): 177.

<sup>26</sup> Widnyana, loc. cit., 30.

<sup>27</sup> Widnyana, loc. cit., 37-42.

<sup>28</sup> Widnyana, loc. cit., 42-43; 46-47.

<sup>29</sup> Wayan P Windia. *Tanya Jawab Hukum Adat Bali*, (Bali, Majelis Utama Desa Pakraman, 2010), pp. 60-66.

*awig* exist that prescribe penalties for breaching *ayah-ayahan* requirements.<sup>30</sup> The sanctions serve as motivation for the *krama* to contribute to the *desa adat* in ways that accomplish order according to the *parihyangan-pawonga-palemahan* philosophy. As in other parts of Indonesia, Balinese customary law is grounded in cultural norms such that it enjoys wide adherence and legitimacy.<sup>31</sup>

### III. THE CONCEPTION OF THE PAKRAMAN PRIMARY VILLAGE COUNCIL

The Balinese concept of every *desa adat* having its own authority to enact *awig-awig* as binding customary law in relation to its own members means that each *desa adat* is autonomous, yet there are many *desa adat*.<sup>32</sup> This means that each *desa adat* exists as network of autonomous villages that are place in different jurisdictions. Traditionally this has been the case with no form of hierarchy in the system. However, around the turn of the last century, a significant number of *desa adat* leaders mobilised to hold meetings to discuss how best to provide coordination and leadership with the aim of strengthening the *desa adat* in the era of globalisation.<sup>33</sup> These meetings culminated in the so-called *Paruman Agung* (Great Conference) in 2004 which resolved to seek the establishment of the *Majelis Utama Pakraman Desa* (the Assembly of the Traditional Balinese Villages; the *Desa Adat* Assembly).

The *Paruman Agung* was held at the *wantilan* (large meeting hall) of the *Samuan Tiga* temple, an auspicious location for the purpose as it was at *Samuan Tiga* that the Hindu religion in Bali was brought from a state of disorder to one of order by the legendary *Mpu Kuturan*. At the time, around 1000 AD, there were a number of Hindu sects in Bali, often jostling for position and causing social disruption. In response to the disorder, the king called a meeting of the leaders of the various sects to deliberate on the best way forward. *Mpu Kuturan* chaired the discussions which resulted in the leaders agreeing on the *Tri-Murthi* (Three Forms of God) formulation of *Bhraman* (the creator), *Wisnu* (the sustainer) and *Siwa* (the disintegrator) as the basis of the pan-Bali Hindu religion, thereby resolving the issue of social fragmentation.<sup>34</sup> The *Tri-Murthi* formulation now manifests in virtually every *desa adat* in Bali with the tri-partite temple complex of *Pura Kahyangan Tiga* wherein *Bhraman* is worshipped in the *Desa* temple, *Wisnu* is worshipped in the *Puseh* temple and *Siwa* is worshipped in the *Dalem* temple.<sup>35</sup> This *Tri-Murthi/Pura Kahyangan Tiga* formulation has become so widely accepted that it has become the standard design of a *desa adat* in Bali.<sup>36</sup> Therefore, by holding the *Paruman Agung* in the *wantilan* of *Samuan Tiga*, something of the history and the spirit of *Mpu Kuturan* and his unifying and

<sup>30</sup> Widnyana, loc. cit., 44.

<sup>31</sup> See for example: Simon Butt. "Polygamy and mixed marriage: the application of marriage law in Indonesian courts" in *Indonesia: Law & Society*, edited by Tim Lindsey (Federation, 1999), p 17.

<sup>32</sup> There are approximately 1500 *desa adat* in Bali.

<sup>33</sup> Wayan P Windia, *Bali Mawacara: Gagasan Satu Hukum Adat (awig-awig) dan Pemerintahan di Bali* (Denpasar, Universitas Udayana/Pelawa Sari, 2008) p. 1.

<sup>34</sup> Diane Carol Butler, I Wayan Ardika, Edi Sedyawati, I Gde Parimartha, "Religiosity in art inspired by Samuan Tiga and Tejakula, Bali: Unity in Diverstiy." *E-Journal of Cultural Studies* Vol.5(2) (01 November 2012).

<sup>35</sup> Made Purana, "Pelaksanaan Tri Hita Karana dalam Kehidupan Umat Hindu", *Jurnal Kajian Pendidikan Widya Accarya* Vol 5, No 1 (2016): 68. See also Fred Eiseman, *Sekala and Niskala Volume 1* (Periplus, Singapore, 1990).

<sup>36</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Bab 1, Art 1(4).

strengthening endeavours may be considered to be imbued in the outcome of the meeting.

By 2001 the Balinese Provincial Parliament (part of the Indonesian national government) had already enacted legislation<sup>37</sup> for the establishment of a new agency aimed at regulating certain aspects of customary law produced by the *desa adat*. This new agency was established to mirror the state hierarchy apparatus at the district (*kabupaten*) and sub-district (*kecamatan*) levels. But following the *Paruman Agung* of 2004 the Balinese Provincial Parliament enacted a province-wide agency in addition to the earlier and lower level of agencies pertaining to customary law.<sup>38</sup> This agency is now known as the *Majelis Desa Adat*<sup>39</sup> (Assembly of Customary Law Villages). The most common method of referring to the organisation generally is with the acronym 'MDA'.

According to the legislation, the MPA has broad authority summarised as follows:

1. Discuss and resolve by consensus problems of custom and religion that are important to the *desa adat*,
2. To resolve disputes that exceed the jurisdiction of a single *desa adat* (such as an inter-village dispute, interpreting (*tafsiran*) challenging *awig-awig* texts, or an appeal from a *desa adat* decision), and
3. To assist the Hindu religious and cultural organisations in Bali.<sup>40</sup>

With this legislative authority the MDA has articulated, formulated and championed relevant matters with external bodies such as national and provincial government agencies and investors on behalf of *desa adat*, and provided services to *desa adat*, such as advice on drafting *awig-awig*, all with the aim of strengthening the *desa adat*.<sup>41</sup> The MDA also acts as a type of law reform body in that it may give a ruling that a particular customary law is still valid or not valid.<sup>42</sup>

It is important to maintain the distinction between the *desa adat* as the source of authority for Balinese customary law of each village and the Balinese Provincial Parliament (as an instrument of the Indonesian national government) as the source of legislation that established the MDA. These two very different sources of authority give rise to legal infrastructure that have, since 2004, shared an intersection in the legal pluralism landscape of Bali. This arrangement reflects a similar situation in native title law in Australia, that is that even though the parliament has enacted legislation that regulates native title law in Australia,<sup>43</sup> the source of the native title itself remains with the local indigenous community.<sup>44</sup>

<sup>37</sup> *Peraturan Daerah Provinsi Bali Nomor 2 Tahun 2001*.

<sup>38</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Article 14.

<sup>39</sup> *Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019*, Article 72.

<sup>40</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Article 16(2); *Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019*, Article 76.

<sup>41</sup> *Anggaran Dasar Anggaran Rumah Tangga Majelis Desa Pakraman* (Majelis Utama Desa Pakraman, Bali, 2004) ix.

<sup>42</sup> *Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019*, Article 24(h) of explanatory memorandum.

<sup>43</sup> *Native Title Act 1993* (Cth).

<sup>44</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 58; *Native Title Act 1993* (Cth) s 223(1).

#### IV. HOW HAS THE MAJELIS UTAMA DESA PAKRAMAN INFLUENCED THE TRADITIONAL CUSTOMARY LAW-MAKING PRACTICES IN BALI?

The major development in jurisprudence is not in the intersections between Indonesian state law and customary law as that has existed since the establishment of the nation. The most revolutionary development in jurisprudential terms is the potential for the MDA to usher in an era of unification and standardisation of Balinese customary law via its functions, thereby creating what could be described as a “quasi-common law system” of customary law in Bali. The use of the term “common law” in this context is not an attempt to link Bali to the English or Western legal traditions<sup>45</sup> in any positional sense. The term “common law” is used here to gleam something of the embryonic condition of the English common law when William the Conqueror rode from county to county, holding court and unifying elements of the already existent law of the land.<sup>46</sup> The context of modern Bali is very different to that of England circa 1066AD. One example will suffice to demonstrate the point: while King William enjoyed all authority, the MDA enjoy only persuasive authority. Nevertheless, the MDA is able to exert what we are calling a “centrifugal force” in respect of Balinese customary law upon all *desa adat* in Bali – something that has never existed before the establishment of the MDA.

In Bali, each *desa adat* asserts its own autonomy without sensing the need to appeal to an external or hierarchical source of authority. In the Balinese context it is axiomatic that every village has its own customs, so much so that the maxim *desa mawacara* (translatable as ‘every village has its own customs’) is asserted and relied upon without contention. Upon this axiomatic maxim each *desa adat* confidently builds its own customary law. The Balinese Provincial Parliament also recognises the original authority (*otonomi asli*) of the *desa adat* to organize their own domestic affairs.<sup>47</sup>

While the *desa mawacara* maxim is well established, a newer jurisprudential proposition has been floated by Professor Wayan P Windia,<sup>48</sup> namely, *Bali mawacara* – ‘Bali has its own customs’. Like the *desa mawacara* maxim, it is hard to deny the obvious accuracy of the statement. But just as the *desa mawacara* maxim provides a secure construct upon which each *desa adat* can build its own customary law, so too does *Bali mawacara* provide a highly persuasive construct upon which a pan-Bali customary law jurisprudence can be developed. The *Bali mawacara* maxim was popularised by the MDA and has just this year (2019) received positive law endorsement with the enactment of *Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019* which recognises *Bali mawacara* as one of the foundations of Balinese customary law.<sup>49</sup>

The persuasive force of the maxim is aided by the relatively recent role played by the MDA as the government agency that resolves cross-jurisdictional disputes and appeals. One of the most influential and potentially controversial roles of the MDA is *tafsiran* (legal interpretation) of *awig-awig*. Like other appeal tribunals, the MDA may be required to interpret an ambiguous text or ‘discover’ the jurisprudence in order to resolve the matter. When a case is brought to the MDA it originates from one or more

<sup>45</sup> Patrick Parkinson. *Tradition and Change in Australian Law* 4<sup>th</sup> ed (Lawbook Co., 2010) pp. 23-28.

<sup>46</sup> Robin Creke, et al. *Laying Down the Law* 10<sup>th</sup> ed (Lexus Nexus, 2017) Parts 1 and 2.

<sup>47</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, 157 [a].

<sup>48</sup> For related material see W P Windia, I G N Suidiana and Relin D E, *Pengertian Praktis Tentang Hukum, Penuntun Prajuru Desa Adat dan Rohaniwan Hindu* (Bali, Swasta Nulus, 2018); Wayan P Windia. *Bali Mawacara: Gagasan Satu Hukum Adat (awig-awig) dan Pemerintahan di Bali* (Denpasar, Universitas Udayana/Pelawa Sari, 2008).

<sup>49</sup> Article 2(i).

discreet *desa adat*, however the *tafsiran* that is pronounced by the MDA is considered highly persuasive for all *desa adat* throughout Bali.<sup>50</sup>

Accordingly, the MDA exerts a centrifugal force upon *desa adat* customary law enactment and decision making via the highly persuasive nature of its interpretations of *awig-awig*. This creates, or at least has the potential to create, a quasi-common law approach to modern Balinese customary law.

In the common law system, the combination of court hierarchies and the doctrine of precedent (*stare decisis*) exerts a strong unifying force upon case law jurisprudence such that notwithstanding numerous jurisdictions and levels of courts it is nevertheless the case that there is only a single common law in Australia.<sup>51</sup> By no means is this exactly the case in the Balinese customary law system. In Bali each *desa adat* has its own inherent and independent authority yet the maxim of *Bali mawacara* and the application of MDA interpretations of *awig-awig* to all *desa adat* combine to exert a unifying force upon Balinese customary law akin to a quasi-common law approach. The central MDA may not strictly be a hierarchical body, nor is *Bali mawacara* a binding authority, but combined they exert a highly persuasive force upon Balinese customary law development.

On the ground, the receptivity towards MDA *tafsiran* and the openness towards *Bali mawacara* vary. Some *tafsiran* are considered more contentious than others. Traditionally, the practice of Balinese customary law has been that only the male descendants have been entitled to receive an inheritance. In 2010 the MDA pronounced a *tafsiran* which radically changed inheritance law from permitting only men to inherit their parents' wealth to men and women being eligible for equal shares of the inheritance.<sup>52</sup> This *tafsiran* received much media attention and remains controversial, radical and almost completely unimplemented almost 10 years later.<sup>53</sup>

Although the term *desa adat* refers to all customary law villages in Bali, there are, in practice, different types of villages in socio-legal terms. The biggest difference between the villages is the degree to which modernity and globalisation have impacted them. Thus a village close to the capital city of Denpasar will have experienced a greater exposure to these forces than will have a village up in the mountains.

*Desa Adat Panjer* can be described as an inner city *desa adat* in the capital city of Denpasar. The current  *bendesa adat* of Panjer is Professor I Nyoman Budiana. The physical context of *Desa Adat Panjer* is that of a modern suburb of Denpasar. Many of the traditional ways of life in the village have been or are in the process of being replaced with new ways. Old restrictions upon social mobility placed upon the low caste (*sudra*) have eroded. Now *sudra* caste people are occupying the highest levels of local government and academia, such as Budiana himself.<sup>54</sup> Budiana asserts the autonomy of *Desa Adat Panjer* yet welcomes the role of the MDA in its capacity to represent the *desa adat* collectively to external agents and to advise the *desa adat*

<sup>50</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001*, Article 16(2)(b).

<sup>51</sup> *Lipohar v The Queen* (1999) 200 CLR 485, 505-506.

<sup>52</sup> Putusan MUDP Bali NO. 01/KEP/PSM-3MUDP BALI/X/2010.

<sup>53</sup> I Ketut Novita Sari, "Pelaksanaan Keputusan Pesmuan Agung III Majelis Utama Desa Pakraman (MUDP) Terkait Kedudukan Perempuan Hindu Bali Sebagai Ahli Waris", <https://docplayer.info/38884811-Pelaksanaan-keputusan-pesamuan-agung-iii-majelis-utama-desa-pakraman-mudp-terkait-kedudukan-perempuan-hindu-bali-sebagai-ahli-waris.html>, accessed 6 January 2020; I Wayan Erwin Widyaswara, "Hukum Warisan Gak Diskriminatif, Yang Bikin Masalah Rakus," <http://bali.tribunnews.com/2019/04/11/hukum-warisan-gak-diskriminatif-yang-bikin-masalah-rakus>, accessed 6 January 2020.

<sup>54</sup> Prof. Dr. I Nyoman Budiana, SH., M.Si, Detail Data Dosen, UNDIKNAS Graduate School, [https://pasca-undiknas.ac.id/ful\\_pagz.php?data=detail\\_dosen&id=7](https://pasca-undiknas.ac.id/ful_pagz.php?data=detail_dosen&id=7) accessed 11 May 2019.

collectively on particular issues, such as how to handle external investors.<sup>55</sup>

In *Desa Adat Penatih*, a village on the outskirts of the capital city of Denpasar, the former *bendesa adat*, I Wayan Sana, describes the members of his village as being quite receptive to applying MDA interpretations in general terms to the local context. In terms of *Bali mawacara* Wayan Sana sees that such a jurisprudence is inevitable in time.<sup>56</sup>

Ketut Pradnya is the current *bendesa* for Desa Adat Selat in Bangli. In contrast to Desa Adat Penatih and Desa Adat Panjer, Desa Adat Selat is geographically far from the cosmopolitan city of Denpasar and its *awig-awig* regulate a far more traditional way of life. Unlike the *desa adat* closer to the city, not all *krama* (official members of the *desa adat*) have a voice in decision making. In Desa Adat Selat, only those people who have a traditional *desa adat* plot of land known as *karangan* are eligible to become *krama*. Furthermore, the decision makers are limited to the original number of heads of families in the village. As the members of a particular family increase, that family still have only one voice in *desa adat* village making. Perhaps due to the remote location and the traditional way of organising the customary law, Desa Adat Selat has not had any new people become *krama* in living memory. Desa Adat Selat remains quite traditional yet *bendesa* Ketut Pradnya considers the advent of the MDA to be a relevant and positive one, especially in terms of the MDA being able to provide leadership to the otherwise unrepresented and unorganised *desa adat* in the era of globalisation.<sup>57</sup>

This extremely limited but representative survey of *desa adat* attitudes towards the MDA suggest that *desa adat* in varying socio-legal contexts have basically positive attitudes toward the role of the MDA, including its facilitation of *Bali mawacara*.

In addition to providing advice to the *desa adat* on how to draft *awig-awig*<sup>58</sup> and how to handle external investors,<sup>59</sup> the MDA have also published guide books advising *desa adat* on a wide range of issues, including how to manage *desa adat* security matters,<sup>60</sup> *desa adat* financial services<sup>61</sup> and even on the topic of *desa adat* members with HIV/AIDS!<sup>62</sup> Furthermore, the MDA have published a 'Question and Answer'-type book that provides expert responses to a very wide range of topics connected to Balinese customary law.<sup>63</sup> The potential for these types of books being published by the MDA is that the answers to the questions set standards that should reasonably be applied to all *desa adat* throughout Bali, thereby facilitating momentum towards *Bali mawacara*.

With the development of *Bali mawacara*, it may be feared that the *desa adat* will unwillingly lose the ability to enact their own *awig-awig*. Such a fear, however, is unreasonable. The *desa adat* assert their own jurisdiction and authority to make *awig-awig* as well as having a Constitutional authority and provincial parliament

<sup>55</sup> Personal communication, Desa Adat Panjer, Denpasar, 9 May 2019.

<sup>56</sup> Personal communication, Desa Adat Penatih, Denpasar, 5 May 2019.

<sup>57</sup> Personal communication, Batu Bulan, Gianyar, 12 May 2019.

<sup>58</sup> Wayan P Windia and I Kadek Sudantra, *Penuntun Penyuratan Awig-Awig Desa Pakraman* (Bali, Majelis Utama Desa Pakraman, 2013).

<sup>59</sup> *Pedoman Penanaman Modal di Desa Pakraman* (Bali, Majelis Utama Desa Pakraman, 2013).

<sup>60</sup> W P Windia and I K Sudantra, *Tuntunan Sesana Pacalang Bali* (Bali, Majelis Utama Desa Pakraman, 2013).

<sup>61</sup> Majelis Utama Desa Pakraman. *Pararem Lembaga Perkreditan Desa (LPD) Bali* (Bali, Majelis Utama Desa Pakraman, 2014).

<sup>62</sup> Majelis Utama Desa Pakraman. *Tuntunan Pendampingan dan Penanganan Krama dengan HIV dan AIDS*, Desa Pakraman di Seluruh Bali (Bali, Majelis Utama Desa Pakraman, 2013).

<sup>63</sup> Wayan P Windia. *Tanya Jawab Hukum Adat Bali*, (Bali, Majelis Utama Desa Pakraman, 2010).

authority to do the same.<sup>64</sup> Secondly, the individuals who hold positions in the MDA are appointed by the *desa adat*, so if the *desa adat* ever considered a correction to the MDA was in order they could effect that correction themselves.<sup>65</sup> Thirdly, the *tafsiran* and other communiques of the MDA have persuasive authority only; legal teeth occur when the *desa adat* implement their own *awig-awig* reflecting the substance of the MDA policy.

An additional impact of the MDA is in the way traditional customary law is practised in Bali. Legal systems may be categorised in various ways. Mattei proposes an approach to categorizing legal systems based on the operation of the law within the system. He offers three categories of which any legal system will be comprised in varying proportions. The categories are professional, political and traditional.<sup>66</sup> Interestingly, the effect the MDA is having in Bali is to increase the professionalism of the practice of customary law through improved records, statutory drafting and the inclusion of human rights.

## V. CONCLUSION

Customary law in Bali has existed for hundreds of years, if not longer. In all of that time there has never been any form of institutional hierarchy nor jurisprudential device that has exerted a unifying force on Balinese customary law. That is until the development of the MDA a bit over a decade ago and the formal recognition of *Bali mawacara* in 2019. With these two developments, Balinese customary law now experience two persuasive forms of authority which exert a centrifugal force with the potential to significantly unify Balinese customary law in the future.

Given the recent legislative recognition of *Bali mawacara* as one of the foundations for developing customary law in Bali, it is timely and appropriate to consider how *Bali mawacara* itself should be developed in the near future.

Our suggestions are offered in two regards: practical and philosophical. On the practical front, we suggest that the topics of Balinese customary law be divided into three categories according to how responsive they are likely to be to the *Bali mawacara* approach - that is, likely unresponsive, likely somewhat responsive and likely highly responsive - and for the MDA to focus on those categories of law that are more likely to be responsive. In terms of philosophy, we encourage academics and others to consider the unifying role that the Besakih Temple and other related sacred sites has played in the history of religion in Bali and to consider jurisprudence that draws upon this unifying force. This approach is consistent with the 2019 legislation enacted by the Balinese Provincial Government which recognises Besakih as a spiritually unifying force for customary law in Bali.<sup>67</sup>

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<sup>64</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001, Article 1(4); Constitution of the Republic of Indonesia 1945, Article 18.*

<sup>65</sup> *Peraturan Daerah Provinsi Bali Nomor 3 Tahun 2001, Article 15(3).*

<sup>66</sup> Ugo Mattei. "Three patterns of law: taxonomy and change in the world's legal systems." *American Journal of Comparative Law* Vol 5-44 (1997): 45.

<sup>67</sup> *Peraturan Daerah Provinsi Bali Nomor 4 Tahun 2019, explanatory memoranda.*

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